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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JON DAVID TAFOYA, Defendant and Appellant.	G040184 (Super. Ct. No. 05ZF0121) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Richard Schwartzberg for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

In April 2005, defendant Jon David Tafoya was stopped by a deputy sheriff after he was observed driving his truck erratically. The deputy asked defendant to turn off the engine. Defendant replied, "sure," but then shifted the truck into gear and sped away. Minutes later, while driving westbound on the eastbound side of a road, defendant's truck crashed head-on into a car that was traveling eastbound, killing the car's two occupants. Defendant's blood alcohol level was 0.12 percent and his blood also contained metabolites of methamphetamine and cocaine. A jury found defendant guilty of two counts of second degree murder.

In accordance with Penal Code section 22, the trial court refused to instruct the jury that it could consider defendant's voluntary intoxication in determining whether he acted with implied malice. (All further statutory references are to the Penal Code.) Defendant challenges the constitutionality of section 22, contending that the court's refusal to so instruct the jury violated his constitutional rights to due process and a fair trial. He also argues the trial court erred by refusing to instruct the jury on involuntary manslaughter as a lesser included offense of second degree murder.

We affirm. As discussed in detail *post*, the trial court's jury instructions applying section 22 to this case did not deprive defendant of his constitutional rights. Furthermore, the trial court did not err by failing to instruct the jury on involuntary manslaughter as a lesser included offense under section 192, subdivision (b) because that subdivision does not apply "to acts committed in the driving of a vehicle."

FACTS

At 11:00 p.m. on April 5, 2005, Deputy Sheriff Todd Russ of the Orange County Sheriff's Department was on duty and sat parked in a black-and-white sheriff's patrol car on the eastbound side of Vista del Lago, facing the intersection of Vista del Lago and Marguerite Parkway. He saw a vehicle approach the opposite side of the

intersection, traveling westbound on Vista del Lago. Russ testified, "I noticed that the front headlights [of the approaching vehicle] dipped abruptly, and I also heard a screeching of tires as if the tires had hit the curb of Vista del Lago, of that vehicle that I was watching." He stated, "[t]he vehicle . . . was there for a . . . few seconds and then entered back into the roadway . . . and came to a stop at the stoplight of Vista del Lago at Marguerite [Parkway] in the center lane." Russ saw the vehicle illegally turn left onto Marguerite Parkway from the center lane of Vista del Lago.

Russ followed the vehicle in order to initiate a traffic stop. He activated his forward-facing solid red lights thereby indicating to the driver of the vehicle to yield to the right curb. The driver of the vehicle did not yield and continued to drive southbound on Marguerite Parkway. Russ activated all of his lights, including flashing lights, to try to get the driver's attention. The vehicle, which was a black Chevrolet Silverado truck, pulled over to the right curb and stopped. Russ illuminated the truck with floodlights, parked the patrol car, and approached the open driver's door window of the truck. He identified the driver, and sole occupant of the truck, as defendant. Russ smelled the odor of alcohol coming from the compartment of the truck, and observed defendant to have bloodshot, watery eyes. Defendant had been drinking at a bar with friends near Vista del Lago that evening.

Russ asked defendant to "please turn off the engine." Defendant responded, "sure. No problem." Defendant then "reached up and put the vehicle into gear." Although Russ told defendant, "no[, s]top" or "turn it off," defendant accelerated rapidly away from Russ.

Russ ran back to his patrol car and notified dispatch of the emergency. He accelerated rapidly in an attempt to catch up to defendant; he activated all of the patrol car's lights and sirens. Russ saw defendant make a right-hand turn onto Jeronimo Road. A second patrol car, driven by Russ's partner Chet Parker, appeared in response to Russ's emergency call and turned onto Jeronimo in pursuit of defendant. As Russ turned onto

Jeronimo, the front tire of the patrol car hit the curb causing a flat tire; driving slowly in the right lane of Jeronimo, Russ followed his partner's patrol car. Parker reported on the radio that defendant was driving the truck westbound in the eastbound lanes of Jeronimo.

Russ's supervisor, Sergeant James Sewell, who was also responding to Russ's emergency call, was driving in the number one eastbound lane of Jeronimo when he heard Parker's report that defendant was traveling westbound in the eastbound lanes of Jeronimo. "About the same time that the radio call came out," Sewell saw defendant's truck's headlights approaching him head-on. He swerved to the right into the bike lane to avoid a collision; he then saw the truck accelerate past him. Sewell made a U-turn at the median break to pursue defendant.

Defendant's truck, while traveling at approximately 70 miles per hour, struck head-on a 1992 Saturn, carrying Melody Woolbridge and Eusebio Flores, which had been traveling eastbound on Jeronimo Road. The speed limit on Jeronimo Road is 40 miles per hour.

When Russ arrived at the site of the collision, he saw defendant exit the passenger side door of the truck and run up a steep embankment covered in trees and ivy. Russ yelled at defendant to stop and get on the ground. Defendant did not comply and Russ chased after him. When defendant reached the top of the embankment, he surmounted a five-foot-high cinder block wall. Russ followed, continuing to yell at defendant to stop. Defendant ran through the backyard of a residence toward the front of the house, where he was stopped by a gate. Defendant continued to run away from Russ in the backyard; Russ was able to grab defendant by the arm and take him to the ground. Defendant resisted, even after being handcuffed.

Flores was pronounced dead at the scene. Woolbridge died a short time later.

A senior forensic scientist, Jennifer Harmon, testified that testing of a sample of defendant's blood showed he had a blood alcohol level of 0.12 percent at the

time of the collision. She testified defendant's blood also tested positive for the presence of "[c]annabinoids or T.H.C.-related compounds [which] are the active components found in marijuana," suggesting defendant had used marijuana within six hours of testing. She further testified that the effect of using alcohol and marijuana at the same time increases impairment. Cocaine metabolite was also found in defendant's blood. Harmon stated, however, that because cocaine metabolite is more stable and because no "parent cocaine" was found in defendant's blood, it was not clear whether defendant had used cocaine within three hours or within three days of testing.

Four years before this incident, in May 2001, defendant was pulled over in Sunset Beach by a police officer after defendant failed to stop at a stop sign. Defendant's blood alcohol level was 0.17 percent. Defendant was ordered to enroll in a six-month first offender's driving-under-the-influence program and he enrolled in October 2001. He completed the program in May 2002, which involved attending 15 two-hour group sessions, 12 hours of alcohol and drug education, 12 individual counseling sessions, and 13 Alcoholics Anonymous meetings. As part of the program, defendant heard speakers each describe "how someone driving under the influence has drastically changed their lives," including causing the deaths of loved ones.

PROCEDURAL HISTORY

In a first amended indictment, defendant was accused of two counts of murder in violation of section 187, subdivision (a).[1] The first trial in this action resulted in a hung jury.

Following a second trial, the jury found defendant guilty of two counts of murder in the second degree. The trial court sentenced defendant to two concurrent prison terms of 15 years to life. Defendant appealed.

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[1] Section 187, subdivision (a) provides: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

DISCUSSION

I.

Defendant's Constitutional Rights Were Not Violated by Section 22's Proscription of the Use of Voluntary Intoxication to Negate Implied Malice.

Defendant contends his constitutional rights to due process and a fair trial were violated when the trial court, following section 22, refused to instruct the jury that it may consider defendant's voluntary intoxication to negate implied malice. Thus, defendant does not argue the trial court failed to follow the law but that the law itself is unconstitutional. We conclude defendant's constitutional rights were not violated.

The jury was instructed on murder through a modified version of CALCRIM No. 520 as follows: "The defendant is charged in Counts 1 and 2 with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. *There is no contention that the defendant acted with express malice in this case.* [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not

have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence." (Italics added.) Defendant acknowledges that the prosecution's sole theory was that defendant acted with implied malice, not with express malice.

The trial court refused to instruct the jury that it could consider defendant's voluntary intoxication in determining whether he acted with implied malice. "Section 22 states the basic principle of law recognized in California that a criminal act is not rendered less criminal because it is committed by a person in a state of voluntary intoxication. Evidence of voluntary intoxication is not admissible to negate the capacity to form any mental states for the crimes charged [second degree murder, gross vehicular manslaughter while intoxicated and other related charges]. However, evidence of voluntary intoxication is admissible with respect to the actual formation of a required specific intent." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1113.)

Section 22, as most recently amended in 1995,[2] provides: "(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason

[2] Section 22 was amended in 1995 in response to *People v. Whitfield* (1994) 7 Cal.4th 437, 451, in which the Supreme Court held that evidence of a defendant's voluntary intoxication is admissible to negate implied as well as express malice. "In 1995, among other changes to section 22, the Legislature inserted the word 'express' before the word 'malice' in subdivision (b) of the statute. [Citation.] The legislative history of the amendment unequivocally indicates that the Legislature intended to legislatively supersede *Whitfield*, and make voluntary intoxication inadmissible to negate implied malice in cases in which a defendant is charged with murder: 'Under existing law, as held by the California Supreme Court in *People v. Whitfield* . . . , the phrase "when a specific intent crime is charged" includes murder even where the prosecution relies on a theory of implied malice. [¶] This bill would provide, instead, that evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.'" (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1374-1375.)

of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. [¶] (b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, *or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.* [¶] (c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance." (Italics added.) As the prosecution was not arguing that defendant premeditated, deliberated, or harbored express malice aforethought, evidence of voluntary intoxication under section 22 was irrelevant and properly excluded by the trial court.

In accordance with section 22, the trial court instructed the jury with a modified version of CALCRIM No. 625 which stated: "A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] You may not consider evidence of voluntary intoxication for any other purpose." In the opening brief, defendant states he "concedes that the court's instructions, particularly that of *CALCRIM* number 625 track the provisions of *Penal Code* section 22."

Defendant argues the trial court's application of section 22 violated his constitutional rights because "[c]learly, given that the evidence at trial was that alcohol and drugs, alone or in combination, cloud both judgment and the thinking process, one would expect that Due Process and a fair trial would demand that under those circumstances, the jury would be permitted to question whether a defendant's voluntary intoxication led him to . . . not appreciat[e] the risk to human life." In *People v. Martin, supra,* 78 Cal.App.4th at pages 1115-1117, the appellate court rejected the defendant's constitutional challenge to section 22. The court stated section 22 "is closely analogous to [the Legislature's] abrogation of the defense of diminished capacity. . . . The 1995 amendment to section 22 results from a legislative determination that, for reasons of public policy, evidence of voluntary intoxication to negate culpability shall be strictly limited. We find nothing in the enactment that deprives a defendant of the ability to present a defense or relieves the People of their burden to prove every element of the crime charged beyond a reasonable doubt." (*People v. Martin, supra,* 78 Cal.App.4th at p. 1117.)

In *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298, the appellate court again addressed whether section 22 violated the defendant's due process rights on the ground "the effect is to exclude relevant evidence on the issue of whether [the defendant] harbored a 'conscious disregard' for life." The appellate court explained that section 22, subdivision (b) did not belong to "the prohibited category of evidentiary rules designed to exclude relevant exculpatory evidence." (*People v. Timms, supra,* 151 Cal.App.4th at p. 1300.) Quoting Justice Ginsburg's concurring opinion in *Montana v. Egelhoff* (1996) 518 U.S. 37, the appellate court explained: "'Defining *mens rea* to eliminate the exculpatory value of voluntary intoxication does not offend a "fundamental principle of justice," given the lengthy common-law tradition, and the adherence of a significant minority of the States to that position today. [Citations.]' [Citation.] Under this rationale, [section 22] permissibly could preclude consideration of voluntary intoxication

to negate implied malice and the notion of conscious disregard. Like the Montana statute [at issue in *Montana v. Egelhoff, supra,* 518 U.S. 37], the California Legislature could also exclude evidence of voluntary intoxication in determination of the requisite mental state." (*People v. Timms, supra,* 151 Cal.App.4th at p. 1300.)

The appellate court in *People v. Timms, supra,* 151 Cal.App.4th at pages 1300-1301 further stated, "[s]ubdivision (b) of section 22 establishes, and limits, the exculpatory effect of voluntary intoxication on the required mental state for a particular crime. It permits evidence of voluntary intoxication for limited exculpatory purposes on the issue of specific intent or, in murder cases, deliberation, premeditation and express malice aforethought. The absence of implied malice from the exceptions listed in subdivision (b) is itself a policy statement that murder under an implied malice theory comes within the general rule of subdivision (a) such that voluntary intoxication can serve no defensive purpose. In other words, section 22, subdivision (b) is not 'merely an evidentiary prescription'; rather, it 'embodies a legislative judgment regarding the circumstances under which individuals may be held criminally responsible for their actions.' [Citation.] In short, voluntary intoxication is irrelevant to proof of the mental state of implied malice or conscious disregard. Therefore, it does not lessen the prosecution's burden of proof or prevent a defendant from presenting all relevant defensive evidence."

Citing *People v. Atkins* (2001) 25 Cal.4th 76, 93, the appellate court in *People v. Timms, supra,* 151 Cal.App.4th 1292, 1301 further reasoned, "[f]inally, we note that our Supreme Court has rejected, albeit cursorily, a due process challenge to section 22: '[W]e reject defendant's argument that the withholding of voluntary intoxication evidence to negate the mental state of arson violates his due process rights by denying him the opportunity to prove he did not possess the required mental state.'"

For the reasons discussed *ante*, we similarly conclude that the application of section 22, and the giving of CALCRIM No. 625 to the jury in this case, did not violate defendant's constitutional rights.

II.

The Trial Court Did Not Err by Refusing to Instruct the Jury on Involuntary Manslaughter.

Defendant contends the trial court committed reversible error when it failed to instruct the jury sua sponte on involuntary manslaughter as a lesser included offense of second degree murder.[3] "We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, '"that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, '"would absolve [the] defendant from guilt of the greater offense" [citation] *but not the lesser*' [citation]." (*People v. Cole* (2004) 33 Cal.4th 1158, 1218; *People v. Turk, supra,* 164 Cal.App.4th at p. 1367 ["We apply a de novo standard of review to the question whether the trial court should have given an instruction on the lesser included offense of involuntary manslaughter"].)

In the opening brief, defendant argues: "A killing occurring during the commission of a misdemeanor which is dangerous to human life under the circumstances of its commission can constitute involuntary manslaughter. [Citations.] Involuntary manslaughter may be a lesser included offense of murder. [Citations.] It occurs where a killing is committed 'in the commission of an unlawful act (i.e., speeding, driving on the

[3] Defendant does not argue the trial court should have instructed the jury on any other purported lesser included offenses. In any event, the California Supreme Court in *People v. Sanchez* (2001) 24 Cal.4th 983, 989-990 held that vehicular manslaughter as defined in section 192, subdivision (c) is not an available lesser included offense of murder because vehicular manslaughter requires proof of elements not necessary to a murder conviction.

wrong side of the roadway, each infractions), not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' (*Pen. Code*, § 192, subd. (b).)"

Defendant misstates the law on involuntary manslaughter. Section 192 provides that manslaughter "is the unlawful killing of a human being without malice" and "is of three kinds" which are voluntary, involuntary, and vehicular. Subdivision (b) of section 192 (which the opening brief inaccurately quotes) in its entirety defines involuntary manslaughter as follows: "Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. *This subdivision shall not apply to acts committed in the driving of a vehicle.*"[4] (Italics added.) Although defendant argues, "the People's sole theory was implied malice murder growing out of the act of *driving while intoxicated*" (italics added), the plain language of section 192, subdivision (b) shows it does not apply to the facts of this case. The trial court cannot be obligated to give an instruction on an offense for which there can be no conviction. (*People v. Gurule* (2002) 28 Cal.4th 557, 659 [general rule is trial court may refuse proffered instruction if it is incorrect statement of law]; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 664, p. 955 [misstatement of law concerning elements of offense or defenses available to accused is serious error].)

Thus, the trial court did not err by failing to instruct the jury on involuntary manslaughter as the lesser included offense of second degree murder.

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[4] In the opening brief, defendant inaccurately quoted section 192, subdivision (b) by not only adding a parenthetical that does not exist in that subdivision, but also by omitting the dispositive final sentence of section 192, subdivision (b). As quoted *ante*, the last sentence of subdivision (b), which states that subdivision does not apply to acts committed in the driving of a vehicle, directly contradicts the content of the added parenthetical—that subdivision (b) applies to conduct including speeding and driving on the wrong side of the roadway.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.